

DEFENSE TALK

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CURRENT EVENTS, ARTICLES, AND SUMMARIES OF RECENT CASES AND LEGISLATION IN THE AREAS OF WORKERS' COMPENSATION, LIABILITY, INSURANCE, AND EMPLOYMENT LAW

Industrial Claim Appeals Office Update

The cases summarized here are only a selection of the cases decided by the Industrial Claim Appeals Office. In these summaries ALJ=administrative law judge; DIME=Division-sponsored independent medical examination; DWC=Division of Workers' Compensation; ICAO=Industrial Claim Appeals Office; IME=independent medical examination; MMI=maximum medical improvement; TTD=temporary total disability.

DIMES

ICAO affirmed ALJ Walsh's order that determined claimant failed to overcome the DIME physician's impairment rating. Claimant had obtained an IME who opined that the DIME physician erred by not in-

cluding a 10% shoulder impairment as provided for in the DWC's impairment rating tips for a subacromial decompression/clavicular resection. ICAO held that although the rating tips may be relevant, a physician's application of those tips goes to the weight the ALJ gives to an impairment rating. ICAO may not reweigh the factual record and draw inferences different from those of the ALJ. *Davis v. Mohawk Industries, Inc.*, W.C. No. 4-674-003 (ICAO July 21, 2011)

Late Reporting

ICAO modified ALJ Harr's award of medical benefits and remanded for a new determination of whether a penalty should be awarded against claimant for late reporting. Claimant had been unable to return to his regular work at the employer since September 14, 2008. He reported his back condition to the employer on March 17, 2009, when his private insurance refused to pay for further treatment because his back condition was believed to be work-related. ICAO held that respondents were not liable for medical benefits until they had notice of the injury. ICAO also remanded the case for determination of when claimant knew or reasonably should have known the nature, seriousness, and probable compensable character of his occupational disease. The obligation to report an injury or occupational disease is triggered when claimant knows or reasonably should have known the facts giving rise to a claim. The claimant's ignorance of the

law does not excuse his late action. *Patton v. K & C RV Camping World*, W.C. No. 4-788-086 (ICAO July 5, 2011)

Reopening

ICAO affirmed ALJ Mottram's order denying TTD benefits. The physician who provided claimant's post-MMI maintenance care recommended additional treatment. The insurer denied treatment. Based upon claimant's increased subjective complaints and the physician's testimony, the ALJ determined that claimant's case should be reopened and awarded additional medical benefits. However, the ALJ found that neither of claimant's physicians had provided claimant with work restrictions beyond the permanent work restrictions imposed at the time of MMI, and therefore claimant had failed to prove she was entitled to TTD benefits after reopening. ICAO held that TTD benefits terminate when claimant reaches MMI, and a post-MMI worsening of condition does not necessarily entitle the claimant to an award of TTD even if the claimant is unable to return to the pre-injury employment. A claimant must prove that the worsening resulted in addition physical restrictions that caused impairment of claimant's residual earning capacity beyond that existing at MMI. *Walker v. Premier Concepts, LLC*, W.C. No. 4-674-003 (ICAO July 21, 2011)

The orders summarized here are on file with the editor. If you would like a copy of any order, contact Diane Murley at dmurley@cmb-pc.com or 970-255-8852.

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Practice Pointer

Removing a Provider Whose Care Is Unreasonable

By James R. Clifton

Respondents and claimants may seek to change the health care provider authorized to treat a workers' compensation claimant. The Colorado Workers' Compensation Act provides several methods for a claimant to request a change of provider. But there is only one mechanism provided for respondents to seek a change of provider: Medical Utilization Review (MUR).

The Colorado General Assembly created the MUR process "to review and remedy services ... which may not be reasonably necessary or reasonably appropriate according to accepted professional standards." The process is very exacting, costs a minimum of \$1,250, and can take many months. The Division of Workers' Compensation has promulgated rules governing the MUR process, which is administered by the Utilization Review unit of the Division.

In addition to paying the \$1,250 fee, a party seeking an MUR must:

- Hire a licensed medical professional to review the services rendered in the case and prepare a report of the review.
- File the Division's Request for Utilization Review form together with the following:
 - one copy of an informational package containing the documents

specified by the rule; and

- seven copies of a medical records package containing a table of contents, the report prepared by the licensed medical professional who reviewed the services, and the medical records and other documents specified by the rule. The medical records package must be arranged and bound exactly as described by the rule.

If the request for utilization review is accepted, the Division notifies the provider under review. The provider is entitled to submit a concise written statement regarding whether the treatment provided was reasonably necessary and reasonably appropriate. The provider and the parties also have the right to submit additional medical records to be included in the review.

The Director appoints a committee of three licensed medical practitioners with specialties appropriate to the treatment under review to serve as members of the review panel. Each panel member performs an independent review of all submitted medical records and assesses the appropriateness and necessity of the treatment by the provider under review. Each panel member completes a questionnaire containing a series of standard questions and submits a narrative report explaining each answer.

The panel may recommend by majority vote that a new physician treat the claimant. The panel may also recommend by unanimous vote that payment for services by the provider be retroactively denied or that the provider's Level I or Level II accreditation be revoked. The Director must give great weight to the reports and recommendations of the panel when issuing an MUR order.

Any party, including the provider, can appeal an MUR order to an administrative law judge. If the Director ordered that a change of provider be made or that no change occur, review is limited to the record on appeal. If the Director ordered that payment of fees be retroactively denied or permitted a respondent to deny payments for medical services, the provider may request a de novo hearing. In any appeal, the findings of the panel are afforded great weight by the administrative law judge, and the party disputing the finding of the panel has the burden of overcoming the finding by clear and convincing evidence.

Documents in the MUR case are kept separately from the workers' compensation case to which they relate, and the Director's MUR order is confidential.

If you have any questions about the MUR process, please contact any of the attorneys at Clifton, Mueller, & Bovarnick, P.C.

VICTORIES IN THE TRENCHES

James R. Clifton

In *Colorado Insurance Guaranty Association v. Kukus*, ALJ Friend affirmed the Director's utilization review order requiring a change of provider. Jim persuaded the ALJ that claimant had failed to overcome by clear and convincing evidence the utilization review panel's majority recommendation that there be a change in provider. Jim also argued successfully that the ALJ's review was limited to the record on appeal, and therefore arguments about the appointment of a new ATP after the Director's order could not be considered.

In *Haney v. Shaw, Stone & Webster*, ICAO affirmed ALJ Stuber's order requiring claimant to repay the insurer an overpayment of \$15,494.30. Jim argued successfully that the 1997 amendments to the Workers' Compensation Act to permit reopening of an award on the grounds of overpayment contemplated that the ALJ would have authority to remedy an overpayment by ordering retroactive reimbursement.

Richard A. Bovarnick

In *Pulliam v. Servisair USA, Inc.*, ICAO affirmed ALJ Jones's order that deter-

mined respondents had established by clear and convincing evidence that the opinion of the DIME physician was incorrect. Rich argued successfully that the ALJ's factual determinations were supported by substantial evidence in the record, including the testimony of respondents' occupational medicine expert.

In *Contreras vs. Shamrock Foods Co.*, ALJ Harr denied and dismissed claimant's claim for workers' compensation benefits. Rich presented the testimony of three employer witnesses, whom the ALJ found to

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VICTORIES IN THE TRENCHES

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be more credible than claimant. The ALJ was persuaded that claimant had failed to prove he sustained the injuries alleged and that respondents had proven claimant was responsible for his termination.

Royce W. Mueller

In *Martinez vs. Shaw, Stone & Webster Construction Service, LLC*, ALJ Stuber denied and dismissed claimant's claims for PPD benefits and post-MMI medical benefits. Royce obtained a medical records review from an occupational medicine specialist and an IME from a dermatologist, both of whom wrote reports and testified by deposition that claimant's skin condition was not related to his industrial puncture wound. The DIME physician, a toxicologist, agreed that the medical literature does not support a work cause for claim-

ant's skin condition. Royce persuaded the ALJ that claimant had failed to prove by clear and convincing evidence that the DIME physician's causation determination was incorrect and had failed to prove he would probably need some treatment after MMI due to the work injury.

Holly M. Barrett

In *Nava v. TrueBlue, Inc.*, ALJ Felter denied and dismissed the claim for workers' compensation benefits. Holly presented the testimony of claimant's supervisor and submitted medical records and depositions of an orthopedic surgeon to whom the ATP had referred claimant and the orthopedic surgeon who conducted an IME at the request of respondents. Both surgeons testified that the objective findings were inconsistent with the alleged mechanism of injury and that they believed claimant was magnifying his symptoms. The ALJ found respondents' witnesses to be more credible than claimant and the other treating physicians.

M. Frances McCracken

In *Friesz vs. Wal-Mart Stores, Inc.*, ALJ Harr limited claimant's disfigurement benefits. Claimant sought disfigurement benefits for a scar on the top of her foot and for her use of a cane. Fran persuaded the ALJ that claimant had failed to prove that a physician had prescribed her use of a cane for her injury, and therefore the award of disfigurement benefits should not include any amount for claimant's use of a cane.

Diane K. Murley

In *Martinez vs. Walmart*, ALJ Mottram denied and dismissed claimant's claim for permanent impairment benefits based on a whole person rating for his shoulder injury. Diane submitted medical records and cross-examined claimant to persuade the ALJ that claimant had failed to prove he suffered a functional impairment to a part of the body not contained on the schedule of impairments.

Note: Summaries and articles should not be relied upon as authority for a particular case. Consult any of the attorneys at Clifton, Mueller & Bovarnick, P.C. for advice on the application of all the law to the specific facts of your case or legal problem.



Despite never having adopted the metric system for day-to-day life, Americans are familiar with the basic units, like grams, meters and such. But when it comes to lesser known units, they're clueless, so we thought we'd help the educational process along a bit.

- 1 millionth of a mouthwash = 1 microscope
- Time between slipping on a peel and smacking the pavement = 1 bananosecond
- Time it takes to sail 220 yards at 1 nautical mile per hour = Knotfurlong
- 16.5 feet in the Twilight Zone = 1 Rod Serling
- Half of a large intestine = 1 semicolon
- 1,000,000 aches = 1 megahurtz
- Basic Unit of Laryngitis = 1 Hoarsepower
- 2 million bicycles = 2 megacycles
- 2000 mockingbirds = 2 kilomockingbirds
- 52 cards = 1 decacards
- 1 kilogram of falling figs = 1 Fig Newton
- 1 millionth of a fish = 1 microfiche
- 10 rations = 1 decoration
- 100 rations = 1 C-ration
- 2 monograms = 1 diagram
- 4 nickels = 2 paradigms
- 2.4 statute miles of intravenous surgical tubing at Yale University Hospital = 1 IV League

This month's *ipsi dixit* was forwarded by an anonymous reader. Send your suggestions for "Ipsi Dixit" to the editor at dmurley@cmb-pc.com.

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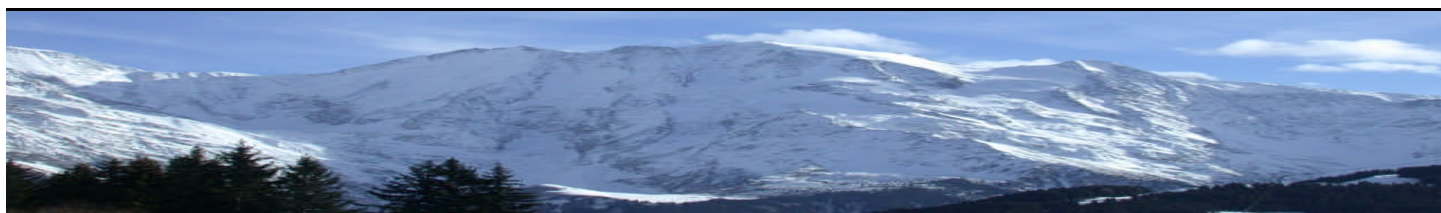
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